STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LAMONTE HATHORN,

Defendant-Appellant.

UNPUBLISHED
August 22, 1997

No. 185782
Muskegon Circuit Court
LC No. 94-037119-FC

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and MCL 750.157a; MSA 28.354(1). We affirm.

I

Defendant claims that he was denied a fair trial by the erroneous admission of evidence of his prior drug activities. This Court reviews the admission of other bad-acts evidence for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

We conclude that the evidence at issue was offered for a proper purpose under MRE 404(b) to show defendant's intent, plan, scheme or system of conspiring with others to possess and distribute drugs. Therefore, the trial court did not abuse its discretion in admitting the other acts evidence. See *People v VanderVliet*, 444 Mich 52, 71; 508 NW2d 114 (1993). We reject defendant's claim that he was unfairly prejudiced by the "sheer mass" of evidence of prior drug activities. As this Court stated in *People v Iaconnelli*, 112 Mich App 725, 754; 317 NW2d 540 (1982), vacated in part on other grounds sub nom *People v Herold (On Rehearing)*, 116 Mich App 176; 321 NW2d 682 (1982), "[c]onspiracy is by its nature a difficult crime to prove, and, if the other evidence was properly admitted, it should make no difference that there was more of it, by 'volume', than the direct evidence of participation in the charged conspiracies."

Defendant also argues that the trial court should have sua sponte issued a cautionary instruction to the jury telling it the limited purposes for which the other acts testimony could be considered. However, the trial court need only give such an instruction upon proper request. *VanderVliet*, *supra* at 75. Our review of the record reveals that defense counsel made no such request.

II

Defendant next claims that the trial court erred in finding that he was not entrapped. Whether entrapment has occurred is a question of law for the court to decide and must be determined on the facts of each case. *People v Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994). This Court reviews a trial court's findings on a claim of entrapment under the clearly erroneous standard. *People v Fabiano*, 192 Mich App 523, 525; 482 NW2d 467 (1992).

Having reviewed the record, we agree with the trial court that defendant was not entrapped. In ruling on the entrapment motion, the trial court properly considered defendant's previous instances of drug-dealing. The court was barred only from considering previous crimes or activities that were not drug related. See *People v Juillet*, 439 Mich 34, 56; 475 NW2d 786 (1991) (Brickley, J.). The court appropriately considered defendant's past history of drug involvement as relevant to a consideration of his willingness to now commit such a crime and as evidence of whether "defendant had been known to commit the crime with which he was charged." See *id.* at 56-57. The fact that defendant was "targeted" does not weigh in favor of defendant's claim of entrapment. To the contrary, entrapment is more likely when an informant goes on a "fishing expedition" and has no reason to believe that a person has any contact with illegal drugs. *People v Jamieson*, 436 Mich 61, 90-92; 461 NW2d 884 (1990) (Brickley, J.); see *Juillet*, *supra* at 57. The burden was on defendant to prove entrapment by a preponderance of the evidence. *Juillet*, *supra* at 61; *Jamieson*, *supra* at 80. Defendant did not sustain his burden, and the trial court did not clearly err in finding that defendant was not entrapped.

III

In his next issue, defendant contends that the trial court erred in admitting Tyrone Bisch's former trial testimony. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

After reviewing the record, we find no abuse of discretion. Defendant does not dispute that Bisch was unavailable and that the prosecutor exercised due diligence in trying to assure his presence at trial. Defense counsel, who was the same attorney at both trials, had the opportunity to and did cross-examine Bisch at defendant's first trial, had a similar motive to develop the testimony where the charges against defendant were the same, and brought out facts from which Bisch's bias and lack of credibility could be inferred by the jury in this case. Defendant was not denied his right of confrontation. Cf. *People v Barclay*, 208 Mich App 670, 673-674; 528 NW2d 842 (1995); *People v Conner*, 182 Mich App 674, 684; 452 NW2d 877 (1990).

IV

Defendant claims there is insufficient evidence to sustain his conviction of conspiracy. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In arguing that there was insufficient evidence to support his conviction, defendant views the evidence in a light most favorable to himself. However, in evaluating sufficiency of the evidence, we are to view the evidence in a light most favorable to the prosecution. *Wolfe, supra*. When viewed in such a light, there is ample evidence whereby a reasonable juror could find that defendant intentionally combined with Lamond Alston and Jakisa Hall and actively participated in a conspiracy with them to buy in excess of 650 grams of cocaine from Anthony Woods on June 14 and 15, 1994, for the purpose of distributing the cocaine to others. See *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993); *People v Atley*, 392 Mich 298, 310-311; 220 NW2d 465 (1974).

V

Next, defendant claims that he was denied effective assistance of counsel. Defendant first argues ineffectiveness of counsel because defense counsel did not move to dismiss the conspiracy charge on the basis that there could be no lawful conspiracy where Woods did not intend to deliver cocaine, intending instead to deliver only soap powder as a substitute.

A conspiracy requires two or more persons with the requisite mens rea. MCL 750.157a; MSA 28.354(1); *Atley, supra*. It is true, as defendant suggests, that *if* the conspiracy involved only defendant and Woods, there could be no conspiracy because Woods lacked the requisite mens rea of the conspiracy. See *id*. at 311-312; Dressler, Understanding Criminal Law, §29.06[A], p389. Defense counsel recognized that Woods could not be culpable as a conspirator and correctly informed the jury that it would have to find a conspiracy between defendant and Jakisa Hall and/or Lamond Alton. It would have been fruitless for defense counsel to move to dismiss the conspiracy charge where defense counsel recognized that potentially two culpable minds existed to form a conspiracy, not including Woods. Counsel is not required to argue a frivolous or meritless motion. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also maintains that he was deprived of the effective assistance of counsel because counsel failed to assert "mere presence" as a defense. We find no merit to this claim. Although defense counsel did not specifically articulate the defense as "mere presence," in essence that is what he argued and defendant was not deprived of this defense.

Defendant additionally claims ineffective assistance of counsel due to defense counsel's failure to challenge the lawfulness of the search and seizure by the police of the home of defendant and his family, defendant specifically claiming there were no exigent circumstances justifying the entry by the police into the home. However, defendant did not move for a new trial or request a *Ginther*[1] hearing on this basis;

therefore, this Court's review is limited to errors apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995). Defendant has not sustained his burden of proving that no valid ground existed for a warrantless entry by the police and that defense counsel was ineffective for failing to challenge the lawfulness of the entry.

VI

Defendant next raises several claims of prosecutorial misconduct. Prosecutorial misconduct issues are decided on a case-by-case basis, and we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine if defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

Contrary to defendant's assertion on appeal, the prosecutor did not give the jury a false impression that Woods was delivering cocaine to defendant in the transaction that formed the basis for defendant's conviction. The prosecutor clearly told the jury in opening argument that soap had been substituted for the cocaine, and he elicited testimony to this effect from several of the witnesses. Defendant further asserts that the prosecutor had a duty to investigate and correct false testimony by Woods regarding phone calls made to Woods by defendant; however, defendant misrepresents Woods' testimony at trial. Woods did not testify that defendant called him from boot camp prior to the time that defendant was released from incarceration. Woods specifically and consistently testified that defendant called him via a page *after* defendant was released from boot camp and that he did not talk to defendant before he got out of boot camp. Regarding the prior perjury committed by Jakisa Hall, the prosecutor informed the jury of the perjury, asked the jury to take it into consideration in judging the credibility of her testimony, and further told the jury that the fact that Hall had committed perjury would reflect negatively on her plea agreement and on the recommendation that the prosecutor's office would give her. Defendant's remaining claims of prosecutorial misconduct are based on issues raised separately and which we concluded above are without merit. Defendant was not denied a fair and impartial trial by any of the claims of prosecutorial misconduct. See *Minor*, *supra*.

VII

Defendant claims that he was deprived of his Sixth Amendment right to an impartial jury due to the systematic exclusion of minorities from jury panels in Muskegon County. However, this claim was not raised below, and defense counsel accepted the jury with the knowledge that apparently there was only one minority person on the jury. There is nothing in the record to support a conclusion that defendant's acceptance of the jury was a "necessary part of trial strategy, designed to avoid alienating prospective jurors" or that defendant was not satisfied with the jury. Cf. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996). By failing to timely challenge his jury array, defendant has forfeited this Court's consideration of this issue. See MCL 600.1354(1); MSA 27A.1354(1); *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996); see also

Hubbard, *supra* at 465-467. Even assuming that this Court's consideration were not forfeited, defendant has failed to establish that the underrepresentation of minorities on the juries in his cases was due to systematic exclusion of minority groups in the jury-selection process. *Duren v Missouri*, 439 US 357, 364, 366; 99 S Ct 664; 58 L Ed 2d 579 (1979).

VIII

Defendant's final claim is that the cumulative effect of errors denied him a fair trial and rendered the resulting conviction unreliable. Because we have concluded that no errors occurred at trial, we reject the argument that the cumulative effect of the errors requires reversal. Cf. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).